No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,

v.

NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE CATHOLIC CHARITIES OF THE ARCHDIOCESE OF NEW YORK, CATHOLIC CHARITIES BROOKLYN AND QUEENS, AMERICAN JEWISH COMMITTEE, THE COMMISSION OF RELIGIOUS LEADERS OF NEW YORK CITY, *ET AL.* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a diverse collection of nonprofit organizations that have a substantial interest in the Court's disposition of this case. *Amici*, their member organizations, and/or the individuals *amici* serve or for whom they advocate will be harmed by a census undercount. Most of *amici* are religious organizations—Christian, Jewish, and Muslim alike—based in New York City. Many of *amici* and their member organizations provide services (*e.g.*, food, housing, education, health) to needy and vulnerable individuals—religious and secular, citizen and noncitizen alike—within their communities. As detailed further below, *amici* and the individuals they serve rely on federal and state funding allocated based on the census, and will be irreparably harmed by an undercount. These and other *amici* also play a significant role in civic life, including by advocating for the interests and protection of religious minorities and encouraging interfaith and inter-ethnic dialogue. In connection with these aims, *amici* are concerned that the funding cuts that result from a census undercount will imperil their missions by heightening competition for scarce resources between diverse communities at the same time that protections for vulnerable groups—like funding from the Department of Homeland Security's Homeland Security Grant Program—could be weakened.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties filed blanket consents to the filing of *amicus* briefs that are on file with the Court.

The Catholic Charities of the Archdiocese of New York (CCANY) seeks to uphold the dignity of each person as made in the image of God by serving the basic needs of the poor, troubled, frail, and oppressed of all religions. It collaborates with parishes and Catholic and non-Catholic partners to build a compassionate and just society. Through a network of administered, sponsored, and affiliated agencies, CCANY delivers, coordinates, and advocates for quality human services and programs touching almost every human need. These programs rely on federal funds.

Catholic Charities Brooklyn and Queens (CCBQ) has been changing lives and building communities since 1899. Its mission is to translate the Gospel of Jesus Christ into action by affirming the dignity and value of every person, especially the most vulnerable members of society. It provides social services for struggling New Yorkers, sponsoring programs and services for children and youth, adults and seniors, persons with developmental disabilities, the mentally ill, and the isolated. CCBQ is one of the largest faith-based providers of affordable housing in the United States. CCBQ depends on federal and state funds allocated based on the census, uses those funds to address poverty and promote justice in its communities, and aims to empower families and individuals to achieve greater self-sufficiency.

American Jewish Committee (AJC) is a national human rights advocacy organization of American Jews. Since its creation in 1906, it has worked to strengthen the democratic features of American political life, one of the most important of which is fair allocation of political power and governmental resources. A full and fair census is essential for the attainment of these purposes.

The Commission of Religious Leaders of New York City (CORL) is an interfaith group whose members of different religious communities—including His Eminence Timothy Cardinal Dolan, Archbishop of New York, the Reverend Dr. A.R. Bernard, Sr., and Rabbi Joseph Potasnik—have come together in all their diversity and difference to recognize the sacred dimension of each other. CORL attempts to do what it believes to be God's will, to: 1) examine the problems with which New York City is faced, such as poverty, racial strife, homelessness, and a breakdown of moral values, family structure and other social institutions; 2) play a strong and pivotal role in the life of New York City by joining together and speaking for the voiceless, seeking racial and economic justice, and serving as an advocacy body to affect society, including government, for the good of all; 3) call public and private interests and the media to focus on and, jointly with CORL, seek to solve these problems; and 4) remind all to not only live their lives better but help to make the lives of others better.

Council of Peoples Organization (COPO) was established in 2002. Its mission is to assist low-income immigrant families, particularly South Asians and Muslims, to reach their full potential. COPO empowers these marginalized communities to advocate for their rights and to understand their responsibilities as Americans. COPO is a "one-stop-shop" social service organization—the largest Muslim/South Asian/Arab-serving center in Brooklyn and the borough's only Halal senior center. It serves nearly 20,000 people per year through case management, legal clinics, and educational programs. COPO depends on state and local funding to provide a broad range of social services, including its senior center

and after school programs. Additionally, COPO assists over 8,500 households per year with Supplemental Nutrition Assistance Program, State Children's Health Insurance Program, and Medicaid screening and enrollment.

Moreover, COPO is committed to celebrating a diverse yet cohesive and tolerant New York. It provides services in 14 languages to assist low-income households from diverse religious, ethnic, and racial backgrounds. COPO aims to build community relations between Muslim and non-Muslim organizations and work together to address shared community challenges.

Federation of Protestant Welfare Agencies (FPWA) promotes the social and economic well-being of greater New York's most vulnerable by advocating for just public policies and strengthening human services organizations. FPWA's member network of more than 170 faith and community-based organizations reaches across more than 1.5 million people in New York each year.

Human Services Council (HSC) strengthens New York's nonprofit human services sector, ensuring New Yorkers from all walks of life, across diverse neighborhoods, cultures, and generations reach their full potential. HSC has approximately 170 nonprofit human services organizations in its membership, many of whom rely on federal funding directly or from pass-through funding to the state and its localities.

The **Jewish Association Serving the Aging (JASA)** has the mission to "to sustain older adults, living safely in their own communities, with independence, dignity, and joy." JASA delivers its services without regard to race, creed, or national origin

and receives funding from over a dozen census-guided federal programs. In 2017, supported by this funding, JASA, among other things: delivered nearly 940,000 Kosher and non-Kosher nutritious meals to homebound individuals and to groups at senior centers; served as a home away from home for approximately 13,000 seniors seeking group activities, friendships, trips, and nutritious meals through 22 senior centers; helped safeguard over 3,100 of the most frail and vulnerable members of its community through its Adult Protective Services and Community Guardian Program; assisted nearly 1,000 family caregivers of ill and disabled older adults with counseling, information, and respite time; assisted 1,000 homebound, frail seniors and those recovering from injury or illness with home care services; provided a home to 2,400 low and moderate income older adults and disabled individuals; provided trained social workers who answered over 14,000 inquiries; and assisted nearly 4,800 seniors living in Naturally Occurring Retirement Communities with educational and recreational activities, supportive counseling, health-related services, and transportation.

The Jewish Board of Family and Children's Services was founded over 140 years ago to serve as a resource to the Jewish immigrant population. Today, The Jewish Board is one of the largest human services agency in New York. Its mission is to strengthen families and communities throughout New York City by helping individuals realize their potential and live as independently as possible. Each year, The Jewish Board provides programming to over 40,000 New Yorkers of all backgrounds across 75 program sites, including in mental and behavioral health, children's well-being, trauma, and recovery. The Jewish Board receives federal funding from over

a half dozen census-guided programs, directly impacting the lives of over 20,000 individuals. This funding has allowed The Jewish Board to provide housing to over 450 survivors of domestic violence; daily nutritious meals for 585 children and 1,970 adults with serious and persistent mental illness; residences for 266 children in Title IV-E Foster Care; prevention services for 1,500 adults and children through the Social Services Block Grant; and protection against eviction for 50 individuals with FEMA's Emergency Food and Shelter Program. In 2018 alone, federal funds supported The Jewish Board's provision of outpatient clinical therapy services to 8,483 individuals with Medicaid coverage (and 364 children enrolled in the State Children's Health Insurance Program); services to 585 children living in its Residential Treatment Centers and Facilities; residential services to 278 individuals with intellectual and developmental disabilities; therapy to 1,970 adults with serious and persistent mental illness; care coordination for 6,593 adults and children; and residences for 911 adults living with serious mental illness.

The **Jewish Community Relations Council of New York (JCRC-NY)** serves as the central coordinating body and resource organization for the Jewish Community in the metropolitan New York area; and as an advocate for a strong and secure State of Israel. An active force in New York civic and communal life, JCRC-NY protects and enhances the New York Jewish community and builds working relationships within the Jewish community, with other ethnic and faith communities, and with public officials and government agencies. Its 50 members, ranging from international to neighborhood organizations, represent a diverse community: the major religious denominations, Jewish defense organizations, social services,

women's organizations, war veterans, Holocaust survivors, emigres, and many local communal and religious organizations. JCRC-NY is also concerned about the security of the thousands of houses of worship located in the New York City metropolitan area.

The **Jewish Education Project** inspires and empowers educators to create transformative Jewish experiences, helping children, teens, and families thrive in today's highly complex and challenging world.

New York Board of Rabbis (NYBR), established in 1881, serves as the primary forum for rabbis serving congregations, organizations, chaplaincies, communal service agencies, and schools. Among other commitments, NYBR works to insure that the Jewish community is provided the highest level of professional pastoral care, counseling, and chaplaincy in the areas of healthcare, behavioral health, long-term care, correctional, and other communal service settings. NYBR also works with other faith communities to promote increased understanding and address issues of common concern.

The **New York State Catholic Conference (NYSCC)** has been organized by the Catholic Bishops of New York State as an institution by which the Bishops speak cooperatively and collegially in the field of public policy and public affairs. NYSCC promotes the common good of society based on the social teaching of the Catholic Church in such areas as education, family life, respect for human life, health care, social welfare, civil rights, criminal justice, the environment, the economy, and immigration. NYSCC acts as an umbrella organization for the many constituent groups making up the Church, including the Council of Catholic Charities Directors. The membership of the Council consists of those individuals charged with the oversight of Catholic Charities in

each of the state's Catholic dioceses. Collectively, these Catholic Charities programs provide a wide variety of services to more than 1,300,000 people each year, funded by federal, state, and local sources in addition to private charitable contributions.

UJA-Federation of New York (UJA) has brought New Yorkers together to solve some of the most pressing problems facing the community for more than 100 years. Through UJA, more than 50,000 donors impact the issues that matter most to them, pooling their resources to care for Jews everywhere and New Yorkers of all backgrounds, respond to crises close to home and far away, and shape the Jewish future. Working with a network of hundreds of nonprofits, UJA extends its reach from New York to Israel to nearly 70 other countries around the world, touching 4.5 million people each year.

INTRODUCTION AND SUMMARY

The decision below should be affirmed, and would have severe negative repercussions for *amici* and the individuals they serve if reversed.

First, the court below correctly concluded that Secretary of Commerce Wilbur L. Ross Jr.'s decision to add a citizenship question to the 2020 census questionnaire (the "Decision") was not "in accordance with law," 5 U.S.C. § 706(2)(A), because the Secretary (i) failed to fulfill his duty to report to Congress well in advance of the census date his proposal to include a citizenship question on the census, see 13 U.S.C. § 141(f)(1), and (ii) violated his statutory duty to rely on administrative records to the "maximum extent possible" instead of making direct inquiries to the public regarding citizenship, *id.* § 6(c); see Pet. App. 259a-284a.

The former failure not only violates the separation of powers generally, but it also has a pernicious anti-democratic effect. *Amici*, similar nonprofit organizations, and other active members of the public were deprived the statutorily-mandated notice that they needed and to which they were entitled to effectively petition their elected leaders in Congress to oppose the Secretary's citizenship question proposal. The Secretary's Decision to short-circuit his notice duty thus is not some mere technical violation of law. Instead, it is conduct that has frustrated the design of our government, and harmed the public in so doing.

Additionally, the § 6(c) violation compounds the harm to the public interests by subjecting the public to excess questioning that Congress intended to prevent by requiring reliance on administrative records.

Second, as the District Court found based on close scrutiny of the evidence before it, the Secretary's unlawful Decision will undoubtedly cause a severe undercount of noncitizen and Hispanic households. It is hard to exaggerate the harm such an undercount will cause to entities like *amici* and the individuals they serve—including citizen and non-Hispanic households. Central among those harms is the unwarranted reduction in and reallocation of governmental funding from the many funding programs that distribute their funding on the basis of census data.

Those funding cuts threaten to cause widespread social chaos. *Amici*, their constituent organizations, and other organizations like them that coordinate and provide social services—like housing, healthcare, and afterschool programs—to deserving but vulnerable populations are already stretched thin. There is an intolerable risk that they will be pushed to the breaking point when they are forced to fill undercount-induced shortfalls resulting from governmental funding cuts. But at the same time that more than ever is asked of *amici*, they will have fewer resources than ever to work with, as they, too, depend on governmental funding streams to support their work. The tragic result will be that the tens of thousands of people who depend on *amici* in the New York metropolitan area—and the millions of others who depend on similar organizations in other undercount areas around the country—will be (quite literally) left out in the cold, without the services which they need and on which they depend. Even though the funding cuts will result from undercounts of mostly noncitizens, the vulnerable populations deprived of vital services as a consequence consist mostly of citizens and documented immigrants. To make matters worse, resource scarcity threatens to foment conflict between

diverse racial, ethnic, and religious groups at a time when, for various other reasons, such tensions are already sadly on the rise in this country.

Amici urge this Court to avoid this tragic state of affairs by ensuring an accurate census count in full compliance with the law.

ARGUMENT

I. THE SECRETARY'S VIOLATION OF THE CENSUS ACT SUBVERTED THE INTERESTS UNDERPINNING CONGRESS'S CONSTITUTIONAL OVERSIGHT RESPONSIBILITY.

The District Court correctly held that the Secretary's Decision violated the Census Act. The Secretary failed timely to report to Congress citizenship status as a proposed subject for the 2020 census, in violation of § 141(f). And the Secretary violated § 6(c)'s clear mandate to "acquire and use information" derived from administrative records to the "maximum extent possible," "instead of conducting direct inquiries." The District Court's judgment vacating the Decision can be affirmed on either of these grounds for reasons detailed by respondents.

1. *Amici* primarily write narrowly to emphasize that beyond undermining important constraints that Congress imposed on the Secretary, the § 141(f) violations significantly interfere with the public's right—which many *amici*, similar nonprofits, and their members frequently exercise—to meaningfully petition their representatives in Congress regarding the census.[2]

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[2] Legislative advocacy is an important tool for many *amici* (including AJC, FPWA, JCRC, JASA, NYSCC, NYRB, and the

The Secretary's violation of § 141(f)'s reporting requirements disturbs the proper separation of powers and undermines the democratic processes that specific provision safeguards. Through the 1976 Census Act, Congress imposed a representative democracy-serving constraint on the Secretary's exercise of delegated authority: a carefully calibrated schedule by which to report to Congress the subjects and questions he planned for the census. See 1976 Census Act sec. 7(a), § 141(f), Pub. L. No. 94-521, 90 Stat. 2459, 2462 (codified at 13 U.S.C. § 141(f)). Section 141(f) provides in relevant part:

> With respect to each decennial . . . census conducted under subsection (a) . . . of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census —
>
> (1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;
>
> (2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and
>
> (3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a re-

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UJA), as well as the parent organizations of *amici*. *See, e.g.*, Catholic Charities USA, *Advocacy*, https://www.catholiccharitiesusa.org/advocacy/ (last visited Mar. 27, 2019).

> port containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

13 U.S.C. § 141(f).

Here, the Secretary submitted an (f)(1) report in March 2017 outlining proposed 2020 census subjects and an (f)(2) report in March 2018 identifying proposed 2020 census questions. Pet. App. 274a. The (f)(1) report did not include citizenship as a proposed census subject; it included only age, gender, race/ethnicity, relationship, and tenure, *i.e.*, owner or renter status. *Id.* Despite its omission as a subject from the Secretary's (f)(1) report, citizenship status was included as a proposed question in his (f)(2) report, which was submitted days after his Decision. *Id.*

This violated § 141(f)(1)'s requirement that the Secretary provide three-years advance notice before adding a subject to the census. Pet. App. 274a. And the Secretary cannot find refuge in § 141(f)(3)'s apparatus for belatedly including new subjects or questions because he neither made the necessary finding that "new circumstances exist which necessitate" modifications, nor submitted a subsequent "report containing [his] determination of the subjects, types of information, or questions as proposed to be modified." 13 U.S.C. § 141(f)(3).

Critically, the Secretary's circumvention of § 141(f)'s intricate procedures was not a technical violation of some bureaucratic reporting scheme. Rather, the § 141(f) violation threatens core democratic processes and undermines the ability of the public, including *amici* and the individuals they serve, to voice their concerns and convey their interests to their representatives in Congress. Although Con-

gress has delegated authority over the census to the Secretary, it remains constitutionally obligated to oversee the Secretary's exercise of that authority, and so has "retained an active role in policing the form, content, and methodology of the census." Pet. App. 25a. Section 141(f) is a key part of that oversight.

The provision establishes a detailed reporting scheme that permits Congress—and the *public*, whose representation and funding depend on the census—to remain apprised of how the Secretary proposes to administer the census, and to challenge or protect that administration as necessary. See S. Rep. No. 94-1256, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5463, 5467 ("[Section 141(f)] requires that the Secretary of Commerce submit at various intervals the subjects and questions to be used in the decennial and mid-decade censuses of population to the appropriate committees of Congress *for their review and recommendations*." (emphasis added)).

It is no accident that § 141(f) requires progressively granular reports to Congress—first identifying the census subjects, then identifying the specific census questions—*years* in advance of the census date, instead of through one perfunctory submission shortly in advance. This is a structure that overtly serves and protects *representative* democracy. It is also telling that § 141(f) offers a specific mechanism for belatedly modifying subjects or questions previously submitted *only* when "new circumstances exist which necessitate" it and a subsequent report is made. 13 U.S.C. § 141(f)(3).

These (f)(3) hurdles highlight the significance of the (f)(1) and (f)(2) reports and the timespans those provisions are designed to preserve (absent special circumstances) for Congress and the public to engage with—and potentially to shape through the political

or judicial process—the proposed census before it is administered. See generally, *e.g.*, Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 Minn. L. Rev. 899, 944 (2001) (encouraging "state governments and advocates" to "lobby Congress" in connection with the census); Nathaniel Persily, *The Right to Be Counted*, 53 Stan. L. Rev. 1077, 1087 (2001) (book review) (discussing *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316 (1999), and noting that "Congress . . . could change . . . at any time" the power that this Court found the Census Bureau lacked). These, of course, are merely specific manifestations of an overarching structural interest in Congress's "institutional" oversight of the Executive, which "strengthen[s] the American *public's* ability to evaluate and reevaluate executive activities and actions." Warren J. Oleszek, Cong. Research Serv., R41079, *Congressional Oversight: An Overview* 6 (2010) (emphasis added).

Flouting these requirements, moreover, uniquely handicaps democratic processes given the nature of a *decennial* census. If the public is deprived of a meaningful opportunity to voice its concerns to its legislators until after the fact, it has no hope of effecting change for *a decade*. Moreover, in light of the myriad policy concerns that the public and legislators face—many of which are more immediate than a survey that then lies many years in the future—the ability to marshal public support for legislative change is less likely still.

2. The Secretary's violation of § 6(c) also harms duly enacted interests of the public. Prior to the 1976 Census Act, the Secretary was authorized to acquire and use "pertinent" information from federal, state, and local authorities in order to gather census-related data. See 13 U.S.C. § 6 (1970). The 1976 Census Act

added a new requirement through § 6(c) that the Secretary "shall"—"[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required"—"acquire and use information available from [administrative sources] instead of conducting direct inquiries." 1976 Census Act sec. 5(a), § 6(c), 90 Stat. at 2460 (codified at 13 U.S.C. § 6(c)). As the District Court aptly explained, "if the collection of data through the acquisition and use of administrative records would be as good or better than collection of data through the census, [§] 6(c) leaves the Secretary no room to choose; he may not collect the data through a question on the census." Pet. App. 266a.

Congress imposed the constraints on the Secretary in § 6(c) to "address[] concerns that the [Census] Bureau was requiring *the citizenry* to answer too many questions in the decennial census." Brief for the United States House of Representatives at 37 n.50, 40, *Dep't of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 767637 (emphasis added). As the enacting Congress explained, the provision was "intended to emphasize the Congress' desire that [the Secretary's authority to rely on data from administrative sources] be used whenever possible in the dual interests of *economizing and reducing respondent burden*." H.R. Rep. No. 94-1719, at 10 (1976) (Conf. Rep.) (emphasis added), *as reprinted in* 1976 U.S.C.C.A.N. 5476, 5477-78; accord, S. Rep. No. 94-1256, at 3, *as reprinted in* 1976 U.S.C.C.A.N. at 5465-66 (similar). Thus, if the decision below is reversed, the citizenry would bear the type of burden that Congress specifically sought to avoid imposing, and, as described *infra* § II, the repercussions for those members of the public who rely on nonprofit services will be severe and harsh.

II. A NET DIFFERENTIAL UNDERCOUNT WILL DECIMATE THE PROVISION OF SOCIAL SERVICES TO VULNERABLE POPULATIONS AND FOMENT INTER-GROUP CONFLICT.

A. The Addition Of A Citizenship Question Will Cause A Net Differential Undercount.

The District Court found that adding a citizenship question to the census will cause a net differential undercount with respect to noncitizen and Hispanic households. Pet. App. 140a.[3] As concerns noncitizen households, the District Court emphasized, "[t]he evidence in the trial record," including "the Census Bureau's *own* considered view," "overwhelmingly supports the conclusion," and "no evidence in the record—from Defendants or otherwise—contradicts it." *Id.* at 141a.

Specifically, a Census Bureau memorandum of December 22, 2017 "summarized evidence that a citizenship question would cause a then-estimated 5.1% decline in self-response rates among noncitizens." Pet. App. 141a. A Census Bureau memorandum of January 19, 2018 "similarly concluded that addition of a citizenship question would reduce self-response rates." *Id.* And a "comprehensive study" by Census Bureau staff published on August 6, 2018 "consolidated the existing data on the impact of a citizenship

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[3] A "noncitizen household[]" is a household that includes at least one person who is not a United States citizen; a "Hispanic household[]" is a household that includes at least one Hispanic person; and "net differential undercount" refers to undercount of a specific group of people—*i.e.*, persons in noncitizen or Hispanic households—that is not matched by corresponding undercounts among other groups of people. Pet. App. 9a, 140a & n.34.

question" and "concluded that a citizenship question would disproportionately reduce noncitizens' self-response rates." *Id.* at 142a. That study updated the predicted 5.1% differential decline in noncitizen household self-response rates from the January 19, 2018 memorandum to a figure of "5.8% on the basis of more recent data," emphasizing that even that 5.8% estimate "was still conservative." *Id.* at 143a (internal quotation marks omitted).[4]

In light of such evidence, the District Court found that "the addition of a citizenship question to the 2020 census will cause an incremental net differential decline in self-responses among noncitizen households of at least 5.8%" and that that finding was "conservative," such that the "the net differential decline could be much higher." Pet. App. 150a. Although the Court found it "hard to quantify the likely magnitude" of the "decline in self-response rates among Hispanic households," it found that that decline would also be "significant" and "support[ed] the overall conclusion that the 5.8% estimate captures

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[4] The August 6, 2018 study also supported the conclusion that, "[s]eparate and apart from its effects on self-response rates among noncitizen households," "adding a citizenship question to the 2020 census will disproportionately depress self-response rates among Hispanic households (some, but not all, of which are also noncitizen households)." Pet. App. 143a-144a. The Census Bureau's own conclusions concerning self-response rates were further bolstered by numerous expert witnesses, including petitioners' own expert, Dr. John M. Abowd, the Census Bureau's Chief Scientist and Associate Director for Research and Methodology, who "credibly testified to the soundness of the Census Bureau's analyses and conclusion that adding a citizenship question to the 2020 census would result in a differential decline in self-response rates among noncitizen households." *Id.* at 42a, 144a.

only part of the citizenship question's differential effects." *Id.* at 150a-151a.

The District Court also found that the Census Bureau's procedures for attempting to make up for the large number of households that do not self-respond to the census questionnaire (known as Non-Response Follow-Up (NRFU)) would only "replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households." Pet. App. 151a. Specifically, the addition of the citizenship question will cause "a previously unanticipated increase in NRFU cases," creating an "enormous" increase in NRFU workload. *Id.* at 152a. The NRFU procedures that failed to remedy net undercounts in prior censuses will thus be unable to remedy the even greater undercounts that would result from the addition of the citizenship question. *Id.* at 153a. Each step of the NRFU process will fail to prevent a differential decline in self-response rates among noncitizen and Hispanic households from translating into a differential undercount of people who live in such households. *Id.* at 154a. "[T]he evidence shows that NRFU cannot—and does not even try to—fix undercounts caused by households leaving certain individual members off their questionnaire, a phenomenon that will be more common among noncitizen and Hispanic households." *Id.* And "even where NRFU does attempt to address the decline in self-responses among noncitizen households, it is at least as likely to fail at that task as the decline in self-response is likely to occur in the first place. This is because many of the reasons that the citizenship question will cause a decline in self-response also apply to NRFU." *Id.* at 155a. Indeed, each of the NRFU's steps—an in-person visit from an NRFU enumerator, the use of administrative records, the use of proxies, and impu-

tation—will reinforce or exacerbate a differential undercount of people who live in noncitizen and Hispanic households. *Id.* at 156a-166a. Petitioners offered "no evidence to support their claim that NRFU will be adequate to the task." *Id.* at 166a.

In sum, the District Court found:

> [T]he addition of a citizenship question to the 2020 census will cause an incremental net decline in self-response rates of at least 5.8% among noncitizen households, and a significant but unquantified net decline in self-response rates among Hispanic households. The Census Bureau's NRFU operations will not remedy those declines, which means that they will translate into an incremental net differential undercount of people who live in such households in the 2020 census.

Pet. App. 169a.

B. The Undercount Will Result In Unwarranted Reallocations Of And Cuts In Governmental Funding.

The distorting effect of a net differential undercount on the allocation of government funds will be severe because a "large number of federal domestic financial assistance programs rely on census data to allocate money." Pet. App. 178a. In fiscal year 2016, for example, "at least 320 such programs allocated about $900 billion using census-derived data." *Id.* (citing Declaration of Dr. Andrew Reamer ¶ 9, *State v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Nov. 7, 2018), ECF No. 508-1 ("Reamer Decl."). These programs include "'state-share' programs"—like Title I Grants to Local Educational Authorities (LEAs); the State Children's Health Insurance Program; the Supplemental Nutrition Program

for Women, Infants, and Children (WIC); Community Development Block Grants/Entitlement Grants; and Head Start—which "rely in whole or part on [a] state's share of the total U.S. population." *Id.* at 178a-179a & n.44 (citing Reamer Decl. ¶¶ 10, 16-17). Still other federal funding programs rely less directly on decennial census data but are still "sensitive to changes" in that data. *Id.* at 179a.

A net differential undercount of people who live in noncitizen and Hispanic households will thus result in a drastic and unwarranted reduction in funding in states and cities with large populations of such persons, like the New York City metropolitan area where *amici* primarily operate. Of course, those funding reductions will impact *citizens*, *non*-Hispanic households, and anyone else who relies on programs shaped by the census.

The District Court found that "a net differential undercount of people who live in noncitizen households and Hispanic populations of as little as two percent—much lower than the net differential undercount would likely be—will cause Plaintiff[] New York . . . to lose funding under the state-share programs." Pet. App. 179a-180a (footnote omitted). Larger net undercounts—like those that will *actually* occur if the citizenship question is added to the census—"would, naturally, lead to correspondingly larger losses." *Id.* at 180a (citing Reamer Decl.). Specifically, the District Court found that New York, along with a number of other large states, "would lose funding under the WIC, Social Services Block Grants, and Title I Grants to LEAs programs"—though those funding losses are "merely illustrative," as New York would "lose funding from other state-share programs as well." *Id.*

Moreover, even a "tiny net differential undercount" would cause New York and other states with similar demographics to lose funds from federal programs that are not state-share programs but that still "distribute resources on the basis of census-derived data." Pet. App. 181a. For instance, Title II, Part A and Title IV, Part A funding to New York under the Every Student Succeeds Act (ESSA) turns on census counts of children living in poverty in New York relative to those counts for other states. Affidavit of Jason Harmon ¶¶ 10, 17, *State* v. *U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Nov. 6, 2018), ECF No. 498-14 [hereinafter Harmon Aff.]. The net differential undercount that will afflict New York will cause New York to lose important ESSA funds that other states that do not suffer an undercount will not lose.

And the harm will be more concentrated still. That is because the *intrastate* distribution of funds under many federal programs turns on census-derived data. Pet. App. 181a. So, for instance, New York as a whole will lose ESSA funds that it is entitled to due to its statewide undercount, but then particular localities in New York where the undercount is the most severe—like New York City—will lose funds relative to other parts of the State that have less severe undercount. Harmon Aff. ¶¶ 12-13. So New York State as a whole will lose vital funds to which it is entitled and would use to, among other things, "train teachers in low performing schools" and "develop tools and resources such as technical assistance aids, guidance materials, and other supports," *id.* ¶ 15, and New York City—and other localities like it—will be given a *still* smaller slice of that already-smaller statewide pie. Those funding cuts will harm citizens and

noncitizens alike whose children depend on properly funded educational programs.

Similarly, "many federal funding programs provide direct funding to localities based on census-derived information, including the Community Development Block Grant ("CDBG"), Emergency Solutions Grant ("ESG") program, and the HOME Investment Partnerships Programs." Pet. App. 182a (citing Affidavit of Emily Freedman ¶¶ 7, 10, 12, *State* v. *U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Nov. 6, 2018), ECF No. 498-7). "These programs provide funding to cities and counties based at least in part on such jurisdictions' share of the overall population count relative to other metropolitan areas and share of the population in poverty." *Id.* Some of the "largest effects" of an undercount will be felt in New York City, Declaration of Dr. Christopher Warshaw ¶¶ 54, 56, *State* v. *U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Nov. 13, 2018), ECF No. 526-1, causing New York City to experience correspondingly large losses under these programs, "whether the funds are routed through state governments or distributed from the federal government directly," Pet. App. 182a.

The funding distortions will even pose a threat to national security. For instance, the Federal Emergency Management Agency (FEMA) distributes grants to state and local governments through the State Homeland Security Program (SHSP) and the Urban Area Security Initiative (UASI). U.S. Gov't Accountability Off., GAO-18-354, *Homeland Security Grant Program: Additional Actions Could Further Enhance FEMA's Risk-Based Grant Assessment Model* 1 (2018), https://www.gao.gov/assets/700/694342.pdf. FEMA uses a "risk-based grant assessment model" to determine the size of the grant it will

make to a given state or local government, *id.* at 6, and one of the key factors in that model is the population of a given state or locality, *id.* at 17-18 (explaining that "population"—which is derived from census data—is a factor accorded "30 percent of the total" weight in the "2018 risk model value"). Accordingly, an undercount will mean that states and localities most at risk will not get the funds they need and to which they are entitled to prevent and mitigate the effects of terrorist attacks and other disasters. Proper allocation of these funds are, sadly, more important than ever. The October 2018 massacre at the Tree of Life Synagogue in Pittsburgh and the recent massacre at a mosque in Christchurch, New Zealand confirm that terrorist activity—and, in particular, such activity targeting people of religious faith—is a troubling feature of our times. To ensure that our states and their localities are as prepared as they need to be, an undercount should not be permitted to distort the distribution of governmental funds.

C. The Funding Cuts Will Prevent *Amici* And Similar Organizations From Providing Desperately Needed Social Services And Threaten To Cause Intergroup Strife.

Unwarranted funding losses will cause severe irreparable injury to *amici* and other similar organizations that are dependent, directly and indirectly, on reliable and predictable funding allocations derived from accurate census data.

1. As a consequence of the undercount-induced governmental funding losses at the state, city, and household level, demand for the social services programs that *amici* and their constituent organizations provide to large populations of vulnerable persons—citizens and noncitizens alike—will *substantially* in-

crease. That increased demand, in turn, threatens to overwhelm the capacity of these already over-utilized social services programs.

For example, consistent with the missions of Catholic Charities organizations nationwide, CCANY delivers services to the poor and troubled and CCBQ seeks to "affirm[] the dignity and value of every person, especially the most vulnerable members of our diverse society." CCBQ, *Our Mission*, https://www.ccbq.org/about-us/mission/ (last visited Mar. 27, 2019). CCANY and CCBQ each serve many thousands of adults, including many senior citizens, and children. CCANY's work, for instance, ensures that millions of meals are served and thousands of families receive shelter and protection from homelessness. CCANY, *Feeding the Hungry & Sheltering the Homeless*, https://catholiccharitiesny.org/what-we-do/feeding-hungry-sheltering-homeless (last visited Mar. 28, 2019). Similarly, CCBQ sponsors more than 160 programs that provide a range of services, ranging from food and health care to affordable housing. See, *e.g.*, CCBQ, *Social Services for Struggling New Yorkers*, https://www.ccbq.org/about-us/ (last visited Mar. 27, 2019). CCANY and CCBQ heavily rely on the contributions of the federal government to operate their programs—including funds from Supplemental Nutrition Assistance Program (SNAP), Child and Adult Care Food Program, Child Care Mandatory and Matching Funds, and Child Care Development Block Grant—as well as on support from numerous New York State agencies. See, *e.g.*, CCBQ, *2016 Form 990, Schedule B: Schedule of Contributors*, at 23-24, https://www.ccbq.org/wp-content/uploads/2019/01/2017-Catholic-Charities-Neighborhood-Services-Form-990.pdf.

Although of a different faith, *amicus* JCRC-NY "operates as a coordinating body to foster joint and cooperative action among its members and other organizations" to, among other things, "[p]romote equality of opportunity and full civil rights and civil liberties for Jewish and all other racial, religious and ethnic groups in New York." JCRC-NY, *Mission Statement, Goals & Purposes*, https://www.jcrcny.org/about-us/mission-statement-purposes (last visited Mar. 27, 2019). JCRC-NY's constituent organizations provide much-needed social services to fill the gaps in the safety net directly provided by government agencies. For instance, the Jewish Community Council of Pelham Parkway (JCCPP) uses, "on a non-sectarian basis," "public and private resources" to "respond to people facing lack of food or imminent eviction or utility turn-off" and "bring[s] government and private sector aid to low-income community residents." JCCPP, *Our Mission*, http://www.jccpelhamparkway.org/home.htm (last visited Mar. 27, 2019). Similarly, the Crown Heights Jewish Community Council (CHJCC) was created in the 1960s "in response to deteriorating social and economic conditions in the Crown Heights neighborhood of Brooklyn, with the mission of assisting all people of the Crown Heights community" through "a wide range of programs that addresses the issues of housing, health care and nutrition, job placement, adult education, at-risk youth, and crime." CHJCC, *About*, http://www.chcentral.org/about/ (last visited Mar. 27, 2019). And the Jewish Community Council of Greater Coney Island (JCCGCI), administers "services that act as a lifeline" for, *inter alia*, the poor, elderly, and educationally at-risk youth that would "not be possible" without funding from the United States Department of Homeland Security and the United States Department of Education. JCCGCI, *Thanks to Our Funders*, https://

www.jccgci.org/what-we-do/#thanks-to-our-funders (last visited Mar. 27, 2019).

Other *amici* provide or coordinate similarly vital social services to vulnerable and deserving populations.

HSC, for example, defines its mission as strengthening "New York's nonprofit human services sector, ensuring New Yorkers from all walks of life, across diverse neighborhoods, cultures, and generations reach their full potential." HSC, *About*, https://humanservicescouncil.org/about (last visited Mar. 27, 2019). These vital community services, ranging from homeless services and senior care to employment training, assist approximately 2.5 million New Yorkers annually. HSC's work supports a wide range of social services organizations, including those addressing "housing access, childcare, elder care, shelters, food pantries, mental health counseling, and disaster response." *Id.* HSC has recognized that adequate funding to and investment in social services organizations is *already* "desperately needed" and that governments have "underfund[ed] human services contracts" for "years." HSC, *2017 Annual Report* 2, https://live-hsc.pantheonsite.io/wp-content/uploads/2018/05/Annual-Report-2017-Final.pdf.[5]

And the UJA cares for "New Yorkers of all backgrounds," UJA, *What We Do*, https://www.

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[5] Notwithstanding these underfunding issues, the nonprofit sector is an economic engine. It is the largest private employer in New York and is bigger nationally than the airline industry. A shift in funding away from vital human services programs therefore will trigger significant economic ramifications not only for the individuals and families who rely on such services, but also for the nonprofits who employ and train individuals and the businesses that rely on nonprofits to buy goods and services ranging from food to construction services.

ujafedny.org/what-we-do/ (last visited Mar. 27, 2019), including by supporting anti-poverty and anti-hunger, elder care, and mental health wellness programs, UJA, *Caring for People in Need*, https://www.ujafedny.org/what-we-do/caring-for-people-in-need/ (last visited Mar. 27, 2019).

The list could go on and on for the ways in which *amici* alone will be harmed by an undercount, not to mention those applicable to other organizations that rely on census-apportioned government funding to provide similar services in New York City and nationwide. *Amici* are uniformly committed to serving the most vulnerable citizen and noncitizen populations that are in desperate need of assistance. But as a result of an undercount and the resulting unwarranted reductions in governmental funding, that mission is going to be made *substantially* harder. That is because the demands on these organizations and countless others like them to provide the vital services that they do will increase substantially when funding to states, cities, and households is slashed. Already stretched thin, they will be pushed to the breaking point to fill the inevitable gaps in services, and tens of thousands of vulnerable and deserving New Yorkers—and millions of similarly situated others around the country who find themselves living in undercounted areas—will be forced to go without the elder care, afterschool programs, food supplements, housing assistance, and countless other social services which they need and on which they depend.

2. Perversely, at the same time that a citizenship question-induced undercount will substantially increase the demand on *amici* and similar organizations, they will be left with fewer resources because their own direct and indirect governmental funding streams will be diminished due to the undercount. So

at the same time that *more than ever* will be expected from these organizations, they will have *less than ever* to work with. This is an intolerable state of affairs.

For example, the JCCGCI, as noted *supra*, at 26, has acknowledged that provision of its life-sustaining services "would not be possible" without its federal government funders. JCCGCI, *Thanks to Our Funders*, *supra*. Like many of the *amici*, the JCCGCI additionally relies on funding provided by municipal and state agencies, including the New York State Office of Temporary and Disability Assistance (NYSOTDA). *Id.* NYSOTDA administers programs like SNAP and the Low-Income Home Energy Assistance Program (LIHEAP).[6] The federal funding allocated to those programs is determined by census-derived data and, accordingly, will be reduced by an undercount.[7]

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[6] *See, e.g.*, NYSOTDA, *Supplemental Nutrition Assistance Program (SNAP)*, https://otda.ny.gov/programs/snap/ (last visited Mar. 27, 2019); NYSOTDA, *Home Energy Assistance Program (HEAP)*, https://otda.ny.gov/programs/heap/ (last visited Mar. 27, 2019).

[7] *See* Andrew Reamer, George Washington Inst. of Pub. Policy, George Washington Univ., *Counting for Dollars 2020: 16 Large Federal Assistance Programs that Distribute Funds on Basis of Decennial Census-Derived Statistics (Fiscal Year 2015), #2: Supplemental Nutrition Assistance Program (SNAP)* 1-2, https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/SNAP%20CFD%2008-18-17.pdf (describing SNAP's "reliance on Census-derived data" and identifying the nearly $70 billion distributed by the federal government overall and the more than $5 billion allocated to New York State through SNAP in fiscal year 2015); Andrew Reamer, George Washington Inst. of Pub. Policy, George Washington Univ., *Counting for Dollars 2020: 16 Large Federal Assistance Programs that Distribute Funds on Basis of Decennial Census-Derived Statistics (Fiscal Year 2015), #15: Low Income Home Energy Assistance Program (LIHEAP)* 1-2, https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/LIHEAP%20CFD%2008-18-17.pdf (describing LIHEAP's "reliance on

Funding cuts at the federal-to-state level in programs like SNAP and LIHEAP will force New York State to make up for these shortfalls by making cuts in the funding provided to deserving and reliant organizations, like the JCCGCI and *amici*. Without those funds, it becomes all the harder for *amici* and other organizations like them to fulfill their vital missions.

Coming from yet another faith tradition, *amicus* COPO stands in the same line of fire. It depends on state and local funding through census-derived federal funding programs to "assist low income immigrant families, particularly South Asians and Muslims, to reach their full potential as residents of New York City." COPO, *About Us*, https://copo.org/about/ (last visited Mar. 27, 2019). The services that it provides, like helping its beneficiaries apply for and enroll in health assistance programs and operating a senior center, are imperiled by an undercount. See COPO, *Our Programs*, https://copo.org/our-programs/ (last visited Mar. 27, 2019).

Indeed, like COPO, many *amici* fear the strains that an undercount will impose on their important work serving senior citizens, at a time when the senior population is increasing and there is an existing need for better services. *Amicus* JASA's mission is "to sustain and enrich the lives of the aging in the New York metropolitan area so that they can remain in the community with dignity and autonomy." JASA, *Mission*, https://www.jasa.org/about/mission

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Census-derived data" and identifying the more than $3 billion distributed by the federal government overall and the nearly $400 million allocated to New York State through LIHEAP in Fiscal Year 2015); *see also* Pet. App. 181a (finding that "even a tiny net differential undercount" will cause the loss of funds from "federal programs that distribute resources on the basis of census-derived data, including . . . LIHEAP").

#.XJUomtpKiUk (last visited Mar. 27, 2019). Carrying out that mission—which includes providing meals, senior centers, housing, caregiving, and elder abuse prevention services to older adults of all races, religions, and economic backgrounds—depends on "government funding." JASA, *FAQ*, https://www.jasa.org/about/faq#.XJUpd9pKiUk (last visited Mar. 27, 2019). That includes funding from programs that make census-derived allocations, like SNAP, Social Services Block Grant (SSBG), Older Adult Protective Services Grant, Nutrition Services for the Aging (OAA, Title III, Part-C), Nutrition Services Incentive Program, Supportive Services and Senior Centers (OAA, Title III, Part B), Disease Prevention and Health Promotion Services (OAA, Title III, Part D), Community Development Block Grants, National Family Caregiver Support Act (OAA, Title III, Part-E), Senior Community Service Employment Program (OAA, Title V), Centers for Medicare and Medicaid Services Research, Medicare Improvement for Patients and Providers Act, Health Insurance Information Counseling and Assistance Program, and others. See generally Andrew Reamer, George Washington Inst. of Pub. Policy, George Washington Univ., *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, New York* 2 (2019), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/IPP-1819-3%20CountingforDollars_NY.pdf. Therefore, an undercount will deprive JASA of the resources it needs to fulfill its senior-focused mission.

Moreover, the problems facing these *amici* and others serving seniors will be compounded in the years to come. Demographers project a steadily increasing population of seniors in New York and an increasingly frail senior population over the coming decade.

The needs will certainly increase. And just as more vulnerable seniors from across the New York City metropolitan area are likely to turn to *amici* due to undercount-induced cuts to government programs, *amici* will have less capacity than ever to provide them with the services that they need.

3. The direct consequences of undercount-induced funding cuts would be devastating to *amici*, their constituent organizations, and, most importantly, the populations that they serve. The possible collateral consequences of strife between racial, ethnic, and religious groups forced to compete for resources that will become scarce are just as troubling.

Amici and their constituent organizations are steadfastly committed to maintaining a vibrantly diverse but cohesive and tolerant New York City metropolitan region. Indeed, they recognize and celebrate racial, ethnic, and religious diversity as one of the region's—and the country's—great assets. But they frankly acknowledge that that same diversity can often be the source of challenges, "including competition for limited resources, hate crimes, and uncivil debate fueled by stereotypes and misperceptions about the 'other.'" JCRC-NY, *Center for Community Leadership*, https://www.jcrcny.org/what-we-do/intergroupcause-ny/ (last visited Mar. 27, 2019). Those challenges have *already* intensified, for various reasons, in recent years. Drastic funding cuts in undercount areas, like New York City, will greatly exacerbate them because it is precisely in those areas where diverse populations live in close quarters and draw on the same pools of public and private resources. Introducing unwarranted reductions in those resources will foment competition and strife between groups, threatening to undo much of the great progress our society has made over the decades in

achieving a cohesive pluralism oriented around a common civic identity and public good.

Sadly, *amici*'s fears are hardly hypothetical. Singed in the not-too-distant memories of many of those who work on behalf of *amici* are episodes like the riots in the Brooklyn neighborhood of Crown Heights in August of 1991, which historians have described as the culmination of intergroup tensions "fertilized by the continuing shortage of housing and other resources." Eric Busch, *Crown Heights, 1991*, at 3 (2003) (unpublished Master's thesis, University of Texas), https://static1.squarespace.com/static/57309edd27d4bdb4d51c92e1/t/57378677f85082cb3f21d582/1463256696687/Crown+Heights+1991.pdf; see *id.* at 17-18 (describing shortages and fights over redistricting). Those riots—pitting portions of the neighborhood's Hasidic population against portions of the neighborhood's black population—endured for three days after a car driven by a Hasidic man jumped a sidewalk and killed a 7-year-old black boy. John Kifner, *A Boy's Death Ignites Clashes in Crown Heights*, N.Y. Times, Aug. 21, 1991, at B1, *available at* http://www.nytimes.com/1991/08/21/nyregion/a-boy-s-death-ignites-clashes-in-crown-heights.html. A "long history of black-Jewish feuding" at the time was given a spark that ignited into a deadly episode. *Id.*; see Busch, *supra*, at 17-18.

Amici recognize and cherish that real progress has been made in resolving conflicts and reducing tensions between diverse groups in Crown Heights and elsewhere in New York City. But now intergroup conflict is on the rise, manifesting itself in a notable and chilling uptick in hate crime, particularly in New York City. See, *e.g.*, Sharon Otterman, *Anti-Semitic Attacks Fuel Continuing Rise in Hate Crimes in New York*, N.Y. Times (Feb. 18, 2019), http://www.

nytimes.com/2019/02/18/nyregion/anti-semitism-brooklyn-new-york.html; N.Y. State Div. of Criminal Justice Servs., *Hate Crime Incidents in New York State by Reporting Agency* (2016), https://www.criminaljustice.ny.gov/crimnet/ojsa/hatecrimeincidents2016.pdf (increases in hate crimes in Manhattan, Brooklyn, and Queens from 2015 to 2016). The very real funding cuts caused by an undercount will heighten competition for scarce resources, pitting group-against-group and threatening to return New York City to its worst period of intergroup suspicion, animosity, and strife. Avoiding that all-too-real possibility is reason enough to ensure a legal and accurate count.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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April 1, 2019